91-728

(1)

Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1991

PREFERRED RESEARCH, INC.,

Petitioner,

v.

SIDNEY H. WRIGHT, III,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Should this Court grant certiorari to consider whether the requirement of F.R.Civ.P. 58 that every judgment shall be set forth on a separate document and is effective only when so set forth applies to a remitted judgment?

II. Should this Court grant certiorari to consider whether a notice of appeal filed within 30 days of the entry of a remitted judgment is timely?

III. When a district court amends a judgment by remitting the amount of the judgment, does F.R.Civ.P. 58 require that a separate document setting out the terms of the remitted judgment be entered before the time for appeal begins to run?

PARTIES

Preferred Research, Inc., a Georgia corporation, Petitioner

Sidney H. Wright, III, Respondent

Pro, Inc., a Georgia corporation, Petitioner's parent corporation

Petitioner's affiliated corporations:

Preferred Research, Inc., a Tennessee corporation
Preferred Research, Inc., a North Carolina corporation
Preferred Research, Inc., a South Carolina corporation
Preferred Research, Inc., a Florida corporation
Preferred Research, Inc., a Virginia corporation

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OPINIONS AND ORDERS BELOW

In *Wright v. Preferred Research, Inc.*, 891 F.2d 886 (11th Cir. 1990), the United States Court of Appeals for the Eleventh Circuit dismissed the Petitioner's appeal filed on January 4, 1989 on the basis that it had been prematurely filed. Since that notice of appeal had been filed prior to the entry of the remitted judgment currently at issue, the court was not presented with the issues raised in this petition and the decision in that case does not dictate the result in this case.

In *Wright v. Preferred Research, Inc.*, 937 F.2d 1556 (11th Cir. 1991), the United States Court of Appeals for the Eleventh Circuit dismissed the Petitioner's appeal filed subsequent to the entry of the remitted judgment, holding that the requirements of F.R.Civ.P. 58 do not apply to remitted judgments. That is the opinion or conclusion of law sought to be reviewed.

JURISDICTIONAL STATEMENT

The decision of the United States Court of Appeals for the Eleventh Circuit sought to be reviewed was entered on August 9, 1991. The court of appeals denied the Petitioner's petition for rehearing on October 10, 1991. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This case was commenced by a complaint filed in the United States District Court for the Middle District of

Alabama on October 22, 1987. Jurisdiction was invoked based upon diversity of citizenship pursuant to 28 U.S.C. § 1332. The Respondent, Sidney H. Wright, III (hereinafter "Wright"), alleged in his complaint that the Petitioner, Preferred Research, Inc., a Georgia corporation (hereinafter "Preferred"), breached a license agreement or employment contract entered into by the parties on or about September 16, 1985, under which Wright was to perform real estate title work for the mutual benefit of the parties. Wright alleged in his complaint that Preferred breached the contract by failing to aid him in securing customers, failing to provide a training program, charging back funds due him from accounts less than 90 days old, and failing to pay him money due for work performed under the contract. The complaint also alleged that Preferred breached the contract by interfering with Wright's business relationship with various customers, causing him to lose customers. In his complaint, Wright also alleged that Preferred committed fraud against him by misrepresenting to him that he would be covered with errors and omissions insurance in issuing real property reports.

Preferred's answer to the complaint was filed on November 19, 1987, denying the allegations of breach of contract and fraud. Preferred counterclaimed against Wright, alleging that he conspired with others to tortiously interfere with its contractual relationships with various of its licensees or employees by seeking to persuade various other licensees of Preferred to terminate their license agreements and to engage in an enterprise in competition with it. Preferred contended that Wright breached the contract by failing to conform to the conditions of the contract and by diverting money due it under

the contract. Preferred contended that Wright committed fraud by diverting money to his own use and misrepresenting that he intended to abide by the conditions of the contract.

On July 11, 1988, the jury trial commenced.

On July 13, 1988, the jury returned a verdict in favor of Wright on the contract and fraud claims. The jury awarded $7,000.00 in compensatory damages and $1,500,000.00 in punitive damages.

On July 14, 1988, the district court entered a judgment on the jury verdict.

On July 21, 1988, Preferred filed a motion for judgment notwithstanding the verdict and motion for new trial.

On December 13, 1988, the district judge denied Preferred's motion for judgment notwithstanding the verdict. Preferred's motion for new trial was denied on the condition that Wright consent to a remittitur in the amount of $1,350,000.00, affording Wright a judgment in the amount of $157,000.00; otherwise, a new trial as to punitive damages on the fraud claim would be ordered.

On December 28, 1988, Wright filed his consent to remittitur and motion to reconsider the order of remittitur.

On January 4, 1989, Preferred filed written notice of appeal to the United States Court of Appeals for the Eleventh Circuit from the judgment entered on July 14, 1988 and the district court's order of December 13, 1988,

denying Preferred's motion for judgment notwithstanding the verdict and motion for new trial conditioned on Wright's consent to the remittitur.

On January 6, 1989, the district court denied Wright's motion to reconsider the order of remittitur.

On or about April 10, 1989, Wright filed a motion to dismiss Preferred's appeal from the judgment entered on July 14, 1988 and the order of December 13, 1988, alleging that Preferred's notice of appeal was prematurely filed.

On July 27, 1989, the court of appeals dismissed Preferred's appeal from the judgment entered on July 14, 1988 and the order of December 13, 1988 on the ground that because Preferred filed its notice of appeal prior to the disposition of Wright's motion for reconsideration, the notice was premature.

On or about August 4, 1989, Preferred filed a petition for rehearing or suggestion for rehearing in banc in the court of appeals.

During November, 1989, counsel of record for Preferred received a telephone call from Wright's attorney, who indicated that in his attempt to obtain a certified copy of the judgment in this case for purposes of execution, he was only able to obtain from the district court clerk a certified copy of the July 14, 1988 judgment in the amount of $1,507,000.00. Wright's attorney indicated to the counsel of record for Preferred that he was giving notice that if he was unsuccessful in obtaining a certified copy of any other judgment in the case, he would attempt to execute on the July 14, 1988 judgment in the amount of $1,507,000.00. Based upon these representations, the

counsel of record for Preferred approached the district court clerk and requested a certified copy of all judgments entered in the case. The district court clerk indicated that the only judgment entered in the case was the July 14, 1988 judgment in the amount of $1,507,000.00. The counsel of record for Preferred explained to the district court clerk that it was the apparent intent of the district judge that the final judgment in the case consist of the remitted amount of $157,000.00. The district court clerk then indicated that he would bring the matter to the attention of the district judge.

On December 1, 1989, the district court entered judgment in favor of Wright in the amount of $7,000.00 in compensatory damages and $150,000.00 in punitive damages.

On December 12, 1989, Wright filed a motion to quash entry of the judgment entered on December 1, 1989.

On December 21, 1989, Preferred filed notice of appeal to the United States Court of Appeals for the Eleventh Circuit from the district court's judgment entered on December 1, 1989 in the remitted amount of $157,000.00.

On January 11, 1990, the United States Court of Appeals for the Eleventh Circuit denied Preferred's petition for rehearing and suggestion for rehearing in banc filed on August 4, 1989. *Wright v. Preferred Research, Inc.*, 891 F.2d 886 (11th Cir. 1990).

On January 17, 1990, the district court denied Wright's motion to quash entry of the December 1, 1989 judgment.

On February 1, 1990, Preferred refiled its notice of appeal from the judgment entered on December 1, 1989.

On or about February 1, 1990, Wright filed a motion to dismiss the appeal filed on December 21, 1989.

On August 9, 1991, the court of appeals granted Wright's motion to dismiss the appeal and dismissed the case, holding that Fed.R.Civ.P. 58 does not apply to a remitted judgment. *Wright v. Preferred Research, Inc.*, 937 F.2d 1556 (11th Cir. 1991).

On August 30, 1991, Preferred filed a suggestion of rehearing in banc, which pursuant to its published rule, was also treated by the court of appeals as a petition for rehearing before the original panel.

On October 10, the court of appeals denied Preferred's suggestion of rehearing in banc and petition for rehearing.

ARGUMENT

The court of appeals misinterpreted Fed.R.Civ.P. 58 by holding that it does not apply to a remitted judgment. That decision of the court of appeals on an important federal question conflicts with prior decisions of this Court. The decision of the court of appeals that Rule 58 does not apply to a remitted judgment conflicts with the decision of the United States Court of Appeals for the Seventh Circuit in *Wikoff v. Vanderveld*, 897 F.2d 232 (7th Cir. 1990).

Fed.R.App.P. 4(a)(1) provides that a notice of appeal shall be filed within 30 days after the date of entry of the judgment or order appealed from. Fed.R.App.P. 4(a)(6) provides that a judgment or order is entered within the meaning of the rule when it is entered in compliance with Rule 58, which provides that every judgment shall be set forth on a separate document and is effective only when so set forth.

The judgment of the district court entered on July 14, 1988 on the jury verdict was not a final judgment since it was subsequently remitted. The district court's order of December 13, 1988 denying Preferred's motion for judgment notwithstanding the verdict and denying Preferred's motion for new trial conditioned upon Wright's consent to a remittitur was not a final order. The order was not final because it provided Wright with several options. If Wright consented to the remittitur, the remitted judgment would be effective. If Wright did not consent to remittitur, a new trial would be granted. If an order provides a party with several options, it is not final and appealable until one of the options is selected and a judgment entered thereon. *Jones v. Craig*, 127 U.S. 213, 32 L.Ed. 147, 8 S.Ct. 1175 (1888). The order of December 13, 1988 was not entered on the civil docket as a judgment. The order was not entered on a separate document as a judgment. The order was a memorandum order or opinion. An order that is part of a district court opinion or memorandum does not meet the separate document requirement. *Hard v. Burlington Northern R. Co.*, 870 F.2d 1454 (9th Cir. 1989); *R. R. Village Ass'n, Inc. v. Denver Sewer Corp.*, 826 F.2d 1197 (2nd Cir. 1987). A final judgment in a case should be complete and self-contained; it

must set forth the relief to which the prevailing party is entitled or the fact that a plaintiff has been denied all relief, and should not incorporate some other document or contain legal reasoning. A document that does not dispose of the case does not start the clock for appeal. A document that does not contain either an award for relief or a declaration that the case is concluded is not a "final judgment" for the purposes of appeal. *Reyblatt v. Denton*, 812 F.2d 1042 (7th Cir. 1987). The fact that the district court order of December 13, 1988 may have become final when Wright consented to the remittitur is not determinative. The question whether an order is a final order is separate from the question whether a separate document setting forth the judgment has been properly entered. *Diamond by Diamond v. McKenzie*, 770 F.2d 225 (D.C. Cir. 1985). Since the district court's order of December 13, 1988 was conditional; since it left Wright with several options; and since it was not entered as a judgment on the docket sheet or on a separate document, it was not a final judgment.

Since the district court judgment of July 14, 1988 was not final and since the district court order of December 13, 1988 was not a separate, self-contained judgment, the running of the time for filing an appeal did not commence. On December 1, 1989, the district court entered judgment on the remitted amount. This was the first final judgment in the case properly entered in compliance with Rule 58. The purpose of the provision of Rule 58 requiring that every judgment must be set forth on a separate document in order to be effective is to eliminate uncertainty over what actions of a district court constitute an entry of judgment and to make certain when a judgment

becomes effective for such purposes as the time for appeal and the making of post-judgment motions. *U. S. v. Indrelunas,* 411 U.S. 216, 36 L.Ed.2d 202, 93 S.Ct. 1562 (1973) (hereinafter *Indrelunas*).

In *Indrelunas,* the appellant had previously filed a notice of appeal from a judgment which had not been properly entered pursuant to Rule 58. The appellant subsequently requested that a judgment be properly entered in compliance with Rule 58. The appellant then filed notice of appeal from that properly entered judgment. This Court held that the time for filing of the notice of appeal did not run until Rule 58 had been complied with. This Court held that the purpose of Rule 58 is to protect an appellant from uncertainties concerning appealability of judgments and must be mechanically applied.

This Court has previously held that Rule 58 should be interpreted to prevent loss of the right of appeal, not to facilitate loss. *Banker's Trust Co. v. Mallis,* 435 U.S. 381, 55 L.Ed.2d 357, 98 S.Ct. 1117 (1978). This Court in that case held that the "separate document" requirement must be strictly construed for the purpose of determining the timeliness of an appeal. This Court held that a party need not file a notice of appeal until a separate document has been filed and entered.

The decision of the court of appeals in this case is inconsistent with decisions of other federal courts of appeal. In *Gregson and Assoc. Architects v. Gov. of the V.I.,* 675 F.2d 589 (3rd Cir. 1982), the court held that even when an appellant incorrectly believes that an order is final and appeals therefrom, the time for filing an appeal does not

begin to run until a judgment is properly entered pursuant to Rule 58.

In its opinion dismissing the appeal for lack of jurisdiction, the court of appeals noted that there are three possible interpretations of Rule 58 that the court could adopt. The court stated that it might embrace an interpretation that required the district court to enter a new, separate document whenever any change is made to the original judgment. The court stated that it could opt for an interpretation that would require another separate document only when the court makes a significant change to the judgment. The court stated that it could interpret Rule 58 to require no additional separate document when an otherwise final judgment is amended. In adopting the latter interpretation, the court of appeals failed to comply with the prior mandate of this Court that Rule 58 be interpreted to prevent loss of the right of appeal, not to facilitate loss. In holding that Rule 58 does not apply to remitted judgments, the court of appeals stated that the absence of any mention of remitted or amended judgments in the rule is an indication that the rule does not apply to amended judgments. By so holding, the court of appeals misinterpreted the plain language of the rule, which clearly states that every judgment shall be set forth on a separate document. By clearly stating that every judgment shall be set forth on a separate document, the rule clearly expresses the intent that there be no exception for remitted judgments.

Since the decision of the court of appeals is in conflict with prior decisions of this Court and decisions of other federal courts of appeal, this petition for writ of certiorari should be granted.

Respectfully submitted this 30th day of October, 1991.

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APPENDIX A

Sidney H. WRIGHT, III,
Plaintiff-Appellee,

v.

PREFERRED RESEARCH, INC., a Georgia Corporation,
Defendant-Appellant.

No. 89-7930.

United States Court of Appeals,
Eleventh Circuit.

Aug. 9, 1991.

Appeal was taken from judgment entered in the United States District Court for the Middle District of Alabama, No 87-T-1046-S, Myron H. Thompson, Chief Judge, and appellee moved to dismiss for lack of jurisdiction. The Court of Appeals, Cox, Circuit Judge, held that separate document setting out terms of district court's remitted judgment did not have to be entered before time for appeal began to run.

Motion granted; appeal dismissed.

George L. Beck, Jr., Dennis R. Pierson, Montgomery, Ala., for defendant-appellant.

Sidney H. Wright, III, pro se.

James A. Ward, III, Dothan, Ala., for plaintiff-appellee.

Appeal from the United States District Court for the Middle District of Alabama.

Before JOHNSON and COX, Circuit Judges, and MORGAN, Senior Circuit Judge.

COX, Circuit Judge:

We consider Wright's motion to dismiss this appeal for lack of jurisdiction. Finding the motion meritorious, we dismiss the appeal.

I. BACKGROUND

The only background relevant to this case is its procedural history, which we will relate in some detail. In the district court plaintiff-appellee Sidney H. Wright, III (Wright), pursuant to a jury verdict, was awarded $7,000 in compensatory damages and $1,500,000 in punitive damages. The judgment, set forth on a separate document in accordance with Fed.R.Civ.P. 58, was entered on July 14, 1988, the day after the jury rendered its verdict. One week later, defendant-appellant Preferred Research, Inc. (Preferred) filed motions for judgment notwithstanding the verdict (JNOV), for new trial, and for a stay of the proceedings. The district court granted Preferred's motion to stay the proceedings pending the disposition of Preferred's other motions.

On December 13, 1988, the district court denied the motion for JNOV and also denied the motion for new trial on condition that Wright consent to a remittitur of $1,350,000 not later than December 28, 1988. If Wright refused to consent, the court stated that it would order a new trial on the issue of damages. Wright filed both a consent to the remittitur and a motion to reconsider the remittitur order on December 28.

On January 4, 1989, Preferred filed its first of three notices of appeal. Two days later, the district court denied Wright's motion to reconsider the order of remittitur, but allowed Wright additional time in which to brief his request for equitable relief contained in the motion to reconsider the remittitur order. On January 31, 1989, the district court denied Wright's motion for reconsideration "in all remaining respects."

In April 1989, Wright filed a motion to dismiss Preferred's January 4, 1989 appeal as premature. In July 1989, upon consideration of that motion, a panel of this court entered an order dismissing Preferred's appeal. The panel reasoned that because Preferred filed its notice of appeal prior to the disposition of Wright's motion for reconsideration, the notice was premature. *See Wright v. Preferred Research, Inc.*, No. 89-7014 (11th Cir., July 27, 1989). Preferred filed a timely petition for rehearing.

While the petition for rehearing was pending, counsel for Wright discovered that the only judgment entered in this case that was set forth on a separate document was the original judgment for $1,507,000. Wright's counsel made counsel for Preferred aware of this fact. Thereafter, both counsel requested that a new judgment on a separate document be entered. The district court complied with this request, stating in an order, "The parties having orally requested that the court enter a new judgment reflecting the remittitur in this case, it is ORDERED that the attached judgment is therefore entered." R.2-115-1. The attached judgment, set forth on a separate document, related Preferred's liability to Wright in accordance with the order of remittitur.

Twelve days later, Wright filed a motion to quash the December 1, 1989 judgment. On December 21, Preferred filed its second notice of appeal. On January 11, 1990, this court denied Preferred's petition for rehearing in a published opinion, *Wright v. Preferred Research, Inc.*, 891 F.2d 886 (11th Cir.1990). The panel reaffirmed its earlier decision that Preferred's first notice of appeal was filed prematurely and was without effect.[1]

On January 17, 1990, the district court denied Wright's motion to quash the December 1, 1989 judgment. The district judge was somewhat incredulous in noting that "[a]t the hearing held on . . . [the] motion to quash, . . . Wright and . . . Preferred . . . acknowledged that they both asked the court to enter its judgment of December 1, 1989. . . . Since this was a joint request, the court does not understand how either Wright or Preferred . . . has anything to complain about." R.2-126-1. Finally, on February 1, 1990, Preferred filed its third notice of appeal in this case.

II. CONTENTIONS

Preferred contends that because a separate document setting out the remitted judgment was not entered in compliance with Rule 58 until December 1, 1989, the time

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[1] Apparently, the panel chose to write an opinion denying rehearing primarily to expand upon the reasoning contained in its earlier unpublished opinion. The court determined that Wright's motion for reconsideration was a Rule 59(e) motion, thus tolling the time for appeal pursuant to Fed.R.App.P. 4(a)(4). *See Wright v. Preferred Research, Inc.*, 891 F.2d 886, 889-90 (11th Cir.1990).

for appeal did not begin to run again until that date. Therefore, Preferred argues its December 21, 1989 notice of appeal was timely. Alternatively, Preferred asserts that if Wright's December 12, 1989 motion to quash tolled the time for appeal, then Preferred's February 1, 1990 notice of appeal was timely. Under either scenario, this court has jurisdiction over Preferred's appeal.

Wright argues that the judgment in this case became final on January 31, 1989, when the district court denied Wright's motion to reconsider the order of remittitur. Therefore, Wright contends, Preferred had 30 days from January 31, 1989 to file its notice of appeal; because Preferred failed to do so, its later notices of appeal are untimely and this court is without jurisdiction.

III. ISSUE ON APPEAL

The jurisdictional question in this case can be simply stated. When a district court amends a judgment, for example by remitting the amount of the judgment, does Fed.R.Civ.P. 58 require that a separate document setting out the terms of the remitted judgment be entered before the time for appeal begins to run? If the answer is yes, we have jurisdiction over this appeal; if the answer is no, we are without jurisdiction.

IV. DISCUSSION

The question presented is one of first impression in this circuit. We will first examine the language of Rule 58, then turn to case law interpreting the rule.

A. The Law

Rule 58 provides in relevant part:

> Subject to the provisions of Rule 54(b): (1) upon a general verdict of a jury, or upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court; (2) upon a decision by the court granting other relief, or upon a special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly approve the form of the judgment, and the clerk shall thereupon enter it. *Every judgment shall be set forth on a separate document.* A judgment is effective only when so set forth and when entered as provided in Rule 79(a).

Fed.R.Civ.P. 58 (emphasis added).[2]

The absence of any mention of remitted or amended judgments is one indication that the rule does not apply to amended judgments. Similarly, the notes accompanying the rule fail to mention remitted or amended judgments. Therefore, the language of the rule and the accompanying notes tell us the rule *may* not apply to amended judgments, but we cannot draw any concrete

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[2] The original judgment in this case, for $1,507,000, was entered as provided in Fed.R.Civ.P. 79(a). There is no issue in this case relative to Rule 79(a) and we consequently will not discuss that rule. We of course acknowledge, however, that simply setting forth a judgment on a separate document is not enough to start the time for appeal – the judgment must also be entered in accordance with Rule 79(a).

conclusions from the language and notes.[3] We turn to Supreme Court cases interpreting the rule.

Two Supreme Court cases delineate the basics of Rule 58. In *United States v. Indrelunas*, 411 U.S. 216, 93 S.Ct. 1562, 36 L.Ed.2d 202 (1973), the Court discussed the purpose of the 1963 amendment to the rule, which added the "separate document" requirement.

> The reason for the "separate document" provision is clear from the notes of the advisory committee of the 1963 amendment. Prior to 1963, there was considerable uncertainty over what actions of the District Court would constitute an entry of judgment, and occasional grief to litigants as a result of this uncertainty. To eliminate these uncertainties, which spawned protracted litigation over a technical procedural matter, Rule 58 was amended to require that a judgment was to be effective only when set forth on a separate document.

Id. at 220, 93 S.Ct. at 1564 (citations omitted). The *Indrelunas* Court established that the rule must be mechanically applied in order to notify the parties regarding when the time for post-trial motions and appeal begins to run.

The Court revisited Rule 58 in *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 98 S.Ct. 1117, 55 L.Ed.2d 357 (1978).

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[3] One could argue that a remitted or amended judgment is simply a "new" judgment, unconnected to the original judgment, and therefore Rule 58 applies to amended judgments. Because there is no mention of such an interpretation in the rule itself or the notes following the rule, we decline to accept this interpretation.

In *Mallis*, the Court held that where (1) the district court intends a document to be a final judgment and; (2) the judgment is entered in accordance with Fed.R.Civ.P. 79(a) and; (3) one party appeals despite the absence of a separate document, and; (4) the appellee does not object to the lack of a separate document, an appellate court may deem Rule 58's separate document requirement waived and take jurisdiction over the appeal. *Id.* at 386-88, 98 S.Ct. at 1121. The Court noted that "[t]he sole purpose of the separate document requirement, which was added to Rule 58 in 1963, was to clarify when the time for appeal . . . begins to run." *Id.* at 384, 98 S.Ct. at 1120. The Court also remarked that the " 'rule is designed to simplify and make certain the matter of appealability. It is not designed as a trap for the inexperienced. . . . The rule should be interpreted to prevent loss of the right of appeal, not to facilitate loss.' " *Id.* at 386, 98 S.Ct. at 1121 (quoting 9 J. Moore, Federal Practice ¶ 110.08[2]). Unfortunately, the Court has never, either in *Indrelunas* and *Mallis*, or in any other case, discussed the precise question we confront today.

Our circuit has never addressed this issue either, and the law on the issue in other circuits is sparse. The Seventh Circuit has apparently concluded that Rule 58 *does* require the entry of a separate document where a judgment has been amended. In *Wikoff v. Vanderveld*, 897 F.2d 232 (7th Cir.1990), the district court entered a judgment. In granting a Rule 59(e) motion, the district court changed the amount of the judgment, but did so only through a minute order – the court did not create a second separate document. The Seventh Circuit said:

> the district court granted Wikoff's motion and amended the original judgment in a minute order. . . . This was insufficient to comply with the "separate judgment" requirement of Rule 58. A minute order suffices when the judge denies a request to alter the judgment, for then the original judgment remains intact. However, when the court grants a Rule 59(e) motion, thus rendering a "new judgment," Rule 58 requires that a new judgment be set forth on a separate document.

Id. at 236 (quotations omitted). The Seventh Circuit's discussion of the issue, limited to the quoted passage, is cursory.

Two other circuits have addressed the issue, although in light of facts distinguishable from the facts in this case. In *RR Village Ass'n, Inc. v. Denver Sewer Corp.*, 826 F.2d 1197, 1200-01 (1987), the Second Circuit concluded that Rule 58's separate document requirement is applicable when the district court reverses its decision regarding which party should prevail. That is, where the district court first rules for one party and enters judgment, then decides the other party should prevail, another judgment on a separate document must be entered in order for the time for appeal to begin to run. The Ninth Circuit has held that Rule 58's separate document requirement does not apply to orders *denying* motions pursuant to Rule 59. *Hollywood v. City of Santa Maria*, 886 F.2d 1228, 1230-31 (9th Cir.1989).

Finally, we note that this court's earlier opinion in this case (the opinion issued upon request for rehearing),

does not decide the question. The court was not presented with the issue we decide today and its decision in that case does not dictate the result in this case.

B. The Analysis

Rule 58 is bottomed upon practical considerations. As the Court in *Mallis* noted, the sole purpose of the rule is to clarify when the time for appeal begins to run. *Mallis*, 435 U.S. at 384, 98 S.Ct. at 1120. Given the rule's focus on practicality and its goal of certainty with regard to the time for appeal, it is appropriate in interpreting the rule to take a practical, common sense approach.

There are three possible interpretations of the rule that we could adopt in this case. First, we might embrace an interpretation that requires the district court to enter a new separate document whenever *any* change, however minor, is made to the original judgment. Second, we could opt for an interpretation that would require another separate document only when the court makes a significant change to the judgment. Third, we could interpret Rule 58 to require no additional separate document when an otherwise final judgment is amended.

We will address each choice seriatim. We reject the first option, which interprets Rule 58 to require a new separate document whenever any change, however minor, is made to the original judgment. Adoption of such an interpretation of the rule potentially would revive litigation long considered dead by the litigants. There would no doubt be cases where the litigants, after having relied on what they believed was a final judgment, discover years later that the case is still subject to

appeal because the district court failed to enter a new separate document after it had made some minor change to the original judgment in the case. Such a result is obviously undesirable. Further, we suppose one could argue that requiring a second separate document for all changes, however inconsequential, enhances certainty because it provides a clear signal to the litigants that the time for appeal has begun to run anew. That is, that such a requirement will notify even the most dilatory litigant that it is time to file his notice of appeal. The logical extension of that reasoning, however, is that Rule 58 requires a new separate document even when the district court *denies* a post-judgment motion, since such a requirement would provide a signal that the time for appeal has begun to run again. This interpretation goes far beyond the scope and purpose of Rule 58 and we decline to adopt it.

We also reject the second option. Requiring the district court to enter a second separate document each time any significant change to the judgment is made would not further Rule 58's goal of certainty. If anything, such a rule would *decrease* certainty. Litigants would be left to speculate regarding which changes are "significant"; that is, which ones require a new separate document and which ones do not. We can envision a potential appellant waiting for a second separate document as his time for appeal runs out because he believes the district court is required to enter a new separate document, only to have an appellate court later tell him that the change made to the judgment is "insignificant," and thus did not require a second separate document under Rule 58.

Having rejected the first two options, we believe the third choice, requiring no second separate document when a district court amends a judgment, is the best choice. First, this interpretation does not detract from the certainty that Rule 58 provides. For example, in this case, the time for appeal began to run on July 14, 1988, when the clerk entered the judgment. Pursuant to Fed.R.App.P. 4(a)(4)[4], the time for appeal was tolled while Preferred's various motions were pending. Once the district court fully disposed of those motions, the time for appeal began to run again. Thus, the combined effect of Fed.R.App.P. 4 and Fed.R.Civ.P. 58 provide certainty regarding when notices of appeals must be filed.

When Rule 59 motions are denied, we require the litigants to use Fed.R.App.P. 4 and Fed.R.Civ.P. 58 to determine the time frame for any notice of appeal they wish to file. We are asking the parties to do no more by declining to require a second separate document when a

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[4] Fed.R.App.P. 4(a)(4) provides:

If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. No additional fees shall be required for such filing.

district court *grants* a motion to alter the judgment. Indeed, that is all Preferred was required to do in this case. In other words, we believe that if the litigants must follow the simple dictates of Fed.R.App.P. 4 whenever a motion to amend or alter the judgment is *denied*, then requiring the same thing whenever such a motion is granted in whole or in part does not create "a trap for the inexperienced."

Second, we hesitate in all cases to interpret a rule to create a result not obviously called for by the language of the rule, especially where there is absolutely no indication of Congress' intent to reach such a result. Therefore, we think the proper rule is that Rule 58 does not require a district court to enter another separate document whenever it amends, remits or in any way alters a judgment that has already been entered once in accordance with Rule 58.

Preferred failed to file a notice of appeal within 30 days of the date on which the district court finally disposed of Wright's motion for reconsideration as it was required to do by Fed.R.App.P. 4. Preferred's later notices of appeal were therefore untimely. We grant appellee Wright's motion to dismiss appellant Preferred's appeal for lack of jurisdiction.

MOTION GRANTED. APPEAL DISMISSED.

APPENDIX B

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA,
SOUTHERN DIVISION

SIDNEY H. WRIGHT, III, Plaintiff, v. PREFERRED RESEARCH, INC., a Georgia corporation, Defendant.	)	CIVIL ACTION NO. 87-T-1046-S FILED JUL 14 1988

JUDGMENT

On the 13th day of July, 1988, after this cause had been submitted to a jury, a verdict was entered as follows:

1. May plaintiff Sidney H. Wright, III, recover on his breach of contract claim against defendant, Preferred Research, Inc.?

YES X
NO _

2. May plaintiff, Sidney H. Wright, III, recover on his fraud claim against defendant, Preferred Research, Inc.?

YES X
NO _

3. If the answer to question #1 or #2 or both is "yes", how much may plaintiff, Sidney H. Wright, III, recover in compensatory damages?

$7,000.00

4. If the answer to question #2 is "yes", how much, if anything, may plaintiff, Sidney H. Wright, III, recover in punitive damages?

$1,500,000.00

DONE, this 13th day of July, 1988

/s/ Donald J. Boone
FOREPERSON

It is therefore the ORDER, JUDGMENT, and DECREE of the court:

(1) That judgment be and it is hereby entered in favor of plaintiff Sidney H. Wright, III, and against defendant Preferred Research, Inc.;

(2) That plaintiff Wright have and recover from defendant Preferred Research, Inc. the sum of $7000.00 in compensatory damages;

(3) That plaintiff Wright have and recover from defendant Preferred Research, Inc. the additional sum of $1,500,000.00 in punitive damages; and

(4) That costs be and they are hereby taxed against defendant Preferred Research, Inc., for which execution may issue.

DONE, this the 14th day of July, 1988.

/s/ Myron H. Thompson
UNITED STATES DISTRICT JUDGE

EOD 7/14/88

APPENDIX C

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA,
SOUTHERN DIVISION

SIDNEY H. WRIGHT, III, Plaintiff,	)	
v.	)	CIVIL ACTION NO. 87-T-1046-S
PREFERRED RESEARCH, INC., a Georgia corporation,	)	(Filed Dec. 13, 1988)
Defendant.	)	

ORDER

On July 14, 1988, this court entered a judgment on a jury verdict in this case for $7,000 in compensatory damages and $1,500,000 in punitive damages in favor of plaintiff Sidney H. Wright on his claims of breach of contract and fraudulent misrepresentation. This cause is now before the court on defendant Preferred Research, Inc.'s July 21, 1988, motions for new trial and for judgment notwithstanding the verdict. For the reasons that follow, these motions are due to be denied except to the extent that the court will order a remittitur of the award of punitive damages to $150,000.00.

I.

Preferred Research has failed to comply with the prescribed requirements for filing a motion for judgment notwithstanding the verdict under Fed. R. Civ. P. 50. By the terms of that rule, a party may file such a motion only if that party moved for a directed verdict at the close of

all evidence presented in the case. Fed. R. Civ. P. 50(b). Although Preferred Research moved for a directed verdict on Wright's claims at the end of Wright's case in chief, Preferred Research did not move for a directed verdict after presenting its substantial evidence in opposition to Wright's claims and in support of its counterclaim. Because of this failure, the court has no authority to entertain Preferred Research's motion for judgment notwithstanding the verdict. *See, e.g., Mark Seitman & Associates, Inc. v. R.J. Reynolds Tobacco Co.*, 837 F.2d 1527, 1531 (11th Cir. 1988); *Coker v. Amoco Oil Co.*, 709 F.2d 1433, 1437-38 (11th Cir. 1983).

II.

Preferred Research's motion for a new trial is not subject to the requirement of a previous motion for directed verdict. *See* Fed. R. Civ. P. 59; *Mark Seitman*, 837 F.2d at 1531. Hence, the court is able to consider the merits of this motion. In so doing, the court recognizes that different standards apply to motions for new trial under Rule 59 than apply to motions for judgment notwithstanding the verdict under Rule 50. *See Watts v. Great Atlantic and Pacific Tea Co.*, 842 F.2d 307 (11th Cir. 1988); 11 C. Wright & A. Miller, Federal Practice and Procedure § 2806 at 42-45 (1973). The court will note these various standards as it considers each of Preferred Research's proffered bases for its Rule 59 motion.

A. UNSWORN WITNESSES.

Preferred Research avers in its motion that two of Wright's witnesses were not sworn or administered the

proper oath before testifying at trial. Preferred Research has not provided any factual basis for this claim, and, in any event, Preferred Research did not object to the testimony of these unidentified witnesses at trial. Thus, it has failed to preserve any objection it may have had to the admission of this testimony.

B. INCONSISTENCY IN VERDICT.

Preferred Research also seeks a new trial on the grounds that the jury verdict is inconsistent, inasmuch as the jury found for Wright on both the breach of contract and fraud claims. Where verdicts on two different issues in a case conflict, a new trial is appropriate. *See Wood v. Holiday Inns, Inc.*, 508 F.2d 167, 175 (5th Cir. 1975); *Seymour v. Summa Vista Cinema, Inc.*, 809 F.2d 1385, 1387 n.2 (9th Cir. 1987). However, if a consistent explanation of the jury's verdict exists, this court must adopt it, even if an inconsistent explanation is also possible. *See Silverberg v. Paine, Webber, Jackson & Curtis, Inc.*, 710 F.2d 678, 685 (11th Cir. 1983); *Griffin v. Matherne*, 471 F.2d 911, 915 (5th Cir. 1973).

The court finds the jury's verdict in this case clearly consistent. Wright's theory of the case include two distinct claims for relief. The core of the breach of contract claim was that Preferred Research had refused to disburse monies claimed by Wright, and due to him under the terms of the contract. The core of the fraud claim was based mainly on the oral representations of Preferred Research's agents at the time of formation of the contract. To the extent the contract was relevant to the fraud claim, the provisions involved (those relating to errors and

omissions insurance) were different from those involved in the breach claim (those relating to payment procedures for Preferred Research's licensees). Preferred Research seems to suggest that Wright denied the validity of the contract in the fraud claim, and asserted the same in the breach claim. Wright clearly took no such position at trial, and the jury's findings that Preferred Research both breached its contract with Wright and issued material misrepresentations regarding unrelated provisions of that same contract are not inconsistent. Preferred Research is not entitled to a new trial on this ground.

C. SUFFICIENCY OF THE EVIDENCE.[1]

This court will grant Preferred Research's motion for a new trial on this ground only "if the jury verdict is contrary to the great weight of the evidence." *Ard v. Southwest Forest Industries*, 849 F.2d 517, 520 (11th Cir. 1988) (per curiam) (citations omitted).

> This rule does not, however, grant a license to the trial judge merely to substitute his judgment for that of the jury on questions of fact. Consequently, when considering a motion for a new trial, the trial judge may weigh the evidence, but it is proper to grant the motion only if the

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[1] The parties have directed their attention in this motion to Wright's fraud claim, and Preferred Research does not appear in the motion or in its brief to challenge the sufficiency of the evidence supporting Wright's breach of contract claim. Preferred Research does argue that the award of compensatory damages, which rests at least in part on the breach claim, was excessive. The court will take this suggestion up below.

> verdict is against the great, not just the greater, weight of the evidence.

Id. at 520-21. By this final comment, the Court of Appeals meant that the trial court must find a clear, substantial discrepancy between the evidence presented and the jury's verdict. As one commentator has authoritatively noted, "the more sharply the evidence conflicts, the more reluctant the judge should be to substitute his judgment for that of the jury." 11 C. Wright & A. Miller, Federal Practice and Procedure § 2806 at 44 (1973). And "when the trial involves simple issues, highly disputed facts, and . . . an absence of 'pernicious occurrences,' trial courts should be considerably less inclined to disturb a jury verdict." *Williams v. City of Valdosta*, 689 F.2d 964, 974 (11th Cir. 1982). This judicial disinclination arises, of course, "out of deference of the right of a litigant to have a jury determination of the facts." *Deas v. Paccar, Inc.*, 775 F.2d 1498, 1503 (11th Cir. 1985), *cert. denied*, 475 U.S. 1129, 106 S.Ct. 1658 (1986).

Alabama law is clear with respect to the elements of a claim of fraudulent misrepresentation. The four elements are: (1) a false representation by defendant to plaintiff; (2) of a material fact; (3) upon which plaintiff reasonably relied; and (4) which resulted in damage to plaintiff. *Sharp Electronics Corp. v. Shaw*, 524 So. 2d 586, 592 (Ala. 1987). A fifth element, applicable to the availability of punitive damages, is either intent to deceive or reckless disregard of falsity on the part of defendant. *Continental Electric Co. v. American Employers' Insurance Co.*, 518 So.2d 83, 88 (Ala. 1987), *cert. denied*, ___ U.S. ___, 108 S.Ct. 1997 (1988). Preferred Research challenges Wright's showing

as to each of the elements under Alabama law of his fraud claim.[2]

1. False statement. Preferred Research argues that Wright has not shown any misrepresentation in this case, because Preferred Research correctly stated the terms of the contract between the parties. In a nutshell, under Preferred Research's version of the facts, it represented to Wright that the company would provide errors and omissions insurance coverage for claims by aggrieved customers. Preferred Research asserts that Wright actually was covered by insurance provided by the company, in that Preferred Research's insurance carrier would have paid the claims of a customer who had been injured by Wright's failure to detect any outstanding interests or claims on property under his review. Preferred Research therefore argues that it correctly explained the import of the errors and omissions insurance provision of the contract, paragraph 9(a), to Wright. Wright argued at trial that Preferred Research could force him to pay the full amount of the claim to Preferred Research despite the insurance coverage. Preferred Research characterizes this argument as a "trap," and asserts that Wright's forced indemnity exposure does not prove that he was not covered, in the sense that an insurance company would pay

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[2] Preferred Research lumps together the first and second elements in arguing that Wright did not prove the existence of any "false, material misrepresentation." Preferred Research's argument, however, goes only to the falsity element. It does not contest the materiality of the representation at issue; the court finds that Wright has adequately proved the materiality of the misrepresentation in this case in any event.

his customers' injuries attributable to his mistakes, by Preferred Research's errors and omissions insurance.[3]

As the court explained at trial, whether Preferred Research's insurance carrier would pay claims arising from errors in Wright's "work product" is not the question presented by Wright's fraud claim. Wright attempted to prove at trial that Preferred Research represented to him that an insurance policy would cover his *personal* potential liability for mistakes made in his production of real property reports. To prove this, Wright relied on paragraph 9(a) of the contract between him and Preferred Research, as well as his testimony and the testimony of other Preferred Research licensees, regarding verbal explanations of that provision by officers of Preferred Research at the time of execution. Paragraph 9(a) reads, in relevant part:

> The nature of the licensed business is such that errors and omissions insurance coverage is essential. Licensee agrees that (1) the errors and omissions coverage provided by Licensor, must and will be utilized exclusively for the solicitation [sic] of business only . . . .

The court noted at trial that this provision of the contract was ambiguous. It might be interpreted to mean that the only use which a licensee could make of Preferred Research's insurance coverage was to solicit new customers, to the exclusion of any other possible uses of the

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[3] Preferred Research also insists that Wright did not present evidence establishing that he was not covered by errors and omissions insurance in his personal capacity.

policy which they might desire. Alternatively, the provision may be understood as requiring licensees to obtain only the insurance policy provided by the company, to the exclusion of any other errors and omissions insurance, presumably in order to ensure mandatory, uniform coverage of each Preferred Research licensee. *See* Record (hereinafter R.) 84-85 (testimony of Jerry Parker). Given this ambiguity, the testimony relating to verbal representations by Preferred Research agents before or during execution of these agreements is clearly admissible to explain the meaning of the provision. The testimony of Wright, R. 124-28, William Grant, R. 52, 54, 60, and Jerry Parker, R. 75-76, 79, 86, provides sufficient evidence for a jury to find that Preferred Research made the representations alleged by Wright in this suit.[4]

In this motion, as at trial, Preferred Research refuses to acknowledge the fact that Wright means a different thing by personal coverage than does Preferred Research. Wright asserts essentially that the company told him that, for a fee of $5.00 per real property report, Wright would be insulated against personal liability for his mistakes in compiling real property reports. If he made no mistakes,

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[4] As the court noted at trial, the testimony of these other licensees tended to show that Preferred Research agents made the representation to Wright, by showing that the representation was a common negotiation tactic of the company. Richard Sawyer also testified for Wright that his contract contained a provision equivalent to paragraph 9(a). His testimony as to oral representations is probably too vague, however, to establish that Preferred Research personnel misrepresented the actual meaning of the provision to him. *See* R. 103, 105-06, 119-20.

the insurance carrier would keep the $5.00 as a premium; if Wright did make a mistake resulting in harm to his customer, the insurance company would pay the claim, with no detriment to Wright, other than perhaps a subsequent increase in the cost of the premium. At trial, Preferred Research stipulated that the policy referred to in paragraph 9(a) did not operate in this fashion in reality. R. 196, 198-202. Thus, so long as the jury believed Wright's evidence that the company represented that the policy *would* operate in this fashion, Wright has proved the existence of a false statement. Evidently, the jury did believe Wright and his witnesses, and the court will not second-guess this credibility determination. Wright satisfied this element of his fraud claim.

2. Reliance. Preferred Research next argues that Wright did not prove that he reasonably relied on the misrepresentations at issue. It argues that because Wright read and initialed each page of the contract, including pages in which he agreed to indemnify the company against certain claims and damages, he cannot have relied on a representation that he was insured against personal liability under the contract.[5] Preferred Research relies on

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[5] The referred section of the contract states:

> Licensee agrees to indemnify and hold Licensor harmless from any and all damages, claims, suits, demands or causes of action, including reasonable attorneys' fees and expenses of defending the same, which may arise or be asserted against Licensor by reason of 1) the operation of Licensee's business (including negligence or wrongdoing of employees or agents of Licensee) or by reason of 2) Licensee's

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Taylor v. Moorman Manufacturing Co., 475 So. 2d 1187 (Ala. 1985). In *Taylor*, the Supreme Court of Alabama held that "[w]here a party has reason to doubt the truth of the representation or is informed of the [actual] truth before the acts, he has no right to act on the [false] representation." 475 So. 2d at 1189.

In this court's opinion, *Taylor* is distinguishable. The point of that case was that if the literal provisions of the contract contradict the contemporaneous oral representations, then the party should at least suspect that the oral representations are less than reliable. This court does not see how the indemnity provisions referred to by Preferred Research would give rise to any reasonable doubt concerning the truth of the representations that Wright was insured personally with errors and omissions insurance.

Preferred Research must argue that the portion of the contract in which Wright agrees to carry liability insurance, under a policy which names Preferred Research as an insured, should lead Wright to doubt that the company has arranged errors and omissions insurance for

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use of Licensor's name, or 3) notwithstanding any rights or remedies available to Licensor as a result thereof pursuant to other provisions hereof, as the result of Licensee's failure to comply with any provision of this Agreement. Licensee agrees to carry his own liability insurance with Licensor as an additional named insured, and insurance for fire and casualty in the amounts and under policies which are approved in writing by the Licensor.

him, as it has represented. Based on the evidence presented at trial, however, the court finds that errors and omissions insurance, as the term is used in the title brokerage industry, carries a different meaning than does general liability insurance. *See* R. 53-54, 59-65, 96-98. Depending on the specific terms of the policy, a general liability insurance carrier could be expected to pay the claims of individuals inadvertently injured in the course of business interaction with Wright. To use the hackneyed example, liability insurance would cover injury to one who slipped and fell within the premises of Wright's office. On the other hand,

> [a]n errors-and-omissions policy is professional-liability insurance providing a specialized and limited type of coverage as compared to comprehensive insurance; it is designed to insure members of a particular professional group from the liability arising out of a special risk such as negligence, omissions, mistakes and errors inherent in the practice of the professions.

7A J. Appleman, Insurance Law and Practice § 4504.01 at 310 (W. Berdal ed. 1979 & Supp. 1988). *See also Bank of California, N.A. v. Opie*, 663 F.2d 977, 981 (9th Cir. 1981) ("A professional obviously performs many tasks that do not constitute professional services. . . . To be covered, the liability must arise out of the special risks inherent in the practice of the profession.").

Given that the more specific, errors and omissions insurance and the more general, liability insurance refer to different types of insurance in this industry, the fact that the contract treats them somewhat differently is unsurprising. Preferred Research presumably includes

the mandatory broad liability insurance provision in its contracts as security of performance of the licensee's promise to indemnify the company against possible claims arising in the general course of business. Moreover, the company allows the licensee to select the liability insurance carrier and policy. This fact does not cast serious doubt on the company's representation that it will provide specialized insurance, charging the licensee a flat premium, to safeguard the licensee (and the company) against a specific type of risk inherent in the title search profession.

In short, the court finds nothing in the contract to put Wright on notice as to the veracity of the oral representations made to him at the time of execution. Wright relied reasonably and sensibly on these representations in entering the contract and in failing to purchase errors and omissions insurance independently to protect himself against personal liability.

3. Actual damages. Preferred Research also argues that Wright did not prove any recoverable damages arising from the fraudulent misrepresentation. Both Preferred Research and Wright address this issue in terms of Wright's assertion at trial of mental anguish and distress arising from his potential liability for the uninsured real property reports of up to $1,500,000. Thus, the court will limit its discussion to whether these damages are recoverable in fraud actions such as this one under Alabama law.

The general rule, as Wright points out, is that "[a] person injured by fraudulent representations can recover all damages contemplated by the parties or which, though not within the contemplation of the parties, were

either the necessary or the natural and proximate consequences." *Jackson Co. v. Faulkner*, 315 So. 2d 591, 597 (Ala. 1975). While the recovery must relate to "actual damages proved at trial," these damages need not be "tangible" in nature, that is, they need not be reducible to specific monetary values. *P & S Business Machines, Inc. v. Olympia U.S.A., Inc.*, 707 F.2d 1321, 1323-24 (11th Cir. 1983) (per curiam) (lost profits recoverable in fraud action). *Accord Super Valu Stores, Inc. v. Peterson*, 506 So. 2d 317, 334 (Ala. 1987). "Actual damages," as that term relates to fraud actions, is an expansive concept, *see Skipper v. South Central Bell Telephone Co.*, 334 So. 2d 863, 866 (Ala. 1976) ("Actual damages include all except that category called punitive, vindictive, or exemplary"); *Comer v. Age-Herald Publishing Co.*, 44 So. 673 (Ala. 1907), and the anxiety suffered by Wright, as established at trial, falls comfortable within the category of intangible losses subsumed within the greater category of actual damages. *See Limbaugh v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 784 F.2d 1086, 1088 (11th Cir. 1986).

4. Availability of punitive damages. Preferred Research next argues that the evidence adduced at trial fails to meet the requirements for awards of punitive damages under Alabama law. As noted above, punitive damages require a showing of either intent to deceive, or reckless disregard of the falseness of the representation on the part of defendant. *Continental Electric Co. v. American Employers' Insurance Co.*, 518 So.2d 83, 88 (Ala. 1987), *cert. denied*, ___ U.S. ___, 108 S.Ct. 1997 (1988).[6] The court

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[6] Preferred Research suggests that Wright must show the fraud was committed "grossly, maliciously, oppressively, and

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believes that the testimony offered by Wright and his witnesses adequately establishes the requisite mental state on the part of Preferred Research agents. The jury heard evidence that the president of Preferred Research and other high-ranking officers represented, when recruiting licensees, that these licensees would be insulated from liability by the company's insurance. Later, after the licensees had entered into contracts with the company and conducted business in its name, these same officials expressed contrary representations, at a time when the licensees were exposed to substantial liability from the same customers they had solicited for the business. The evidence at trial established at least reckless disregard of the truth on the part of officers within the company who may quite reasonably be charged with knowledge of the their company's errors and omissions

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with an intent to deceive" in order to obtain punitive damages, citing *Hall Motor Co. v. Furman*, 234 So. 2d 37, 41 (Ala. 1970). Confusion over the myriad standards for the mental element of punitive damages award is certainly understandable. *See* Comment, *Punitive Damages and Fraud: Alabama's Deceptive Standard*, 35 Ala. L. Rev. 101 (1984). The current standard is "intent to deceive, which must be based upon the initial finding of knowledge of the falsity of the material representation." *Carnival Cruise Lines, Inc. v. Goodin*, slip op., 1988 WL 103054 (Ala. Sept. 2, 1988) (quoting *American Honda Motor Co. v. Boyd*, 475 So. 2d 835, 838 (Ala. 1985)). Reckless disregard of the falsity constitutes constructive knowledge, in satisfaction of this standard. *See Alabama Farm Bureau Mutual Casualty Insurance Co. v. Griffin*, 493 So. 2d 1379, 1384 (Ala. 1986); *Ex Parte Lewis*, 416 So. 2d 410 (Ala. 1982) (per curiam).

insurance policy.[7] The court concludes that Wright has satisfied all requirements for an award of punitive damages under Alabama law.

D. EXCESSIVENESS OF THE AWARD.

The next and final basis presented by Preferred Research in its motion for new trial is that the awards of compensatory and punitive damages are excessive. The court notes at the outset that the issue of whether the jury's verdict is excessive in this case is determined by reference to state substantive law, while the issue of remedy for an excessive verdict is controlled by federal procedural law. *T.D.S. Incorporated v. Shelby Mutual Insurance Co.*, 760 F.2d 1520, 1530 n.8 (11th Cir.), *reh'g granted in part and denied in part and judgment modified on other grounds*, 769 F.2d 1485 (11th Cir. 1985).

1. Compensatory damages. The verdict included an award of $7,000 for compensatory damages arising from both the breach and the fraud claims. At trial, Wright stated that he sought $7,639.81 pursuant to the breach claim, R. 151-52, $625.00 pursuant to the fraud claim, R. 158-59, as well as damages to compensate for the mental anxiety of liability exposure of up to $1,500,000 resulting from the fraudulent misrepresentation. The jury's verdict included $7,000 in compensatory damages.

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[7] Alternatively, the court concludes that the evidence allowed a permissible inference that the Preferred Research agents intended to mislead and deceive Wright. *See Southern Life and Health Insurance Co. v. Smith*, 518 So. 2d 77, 82 (Ala. 1987).

Preferred Research argues that this award is excessive by referring to evidence at trial that Wright had actually already recovered some of the money claimed in the breach claim, and had wrongfully converted money belonging to the company to his own use. In its brief supporting the motion for a new trial, Preferred Research argues that $2,844.00 is the maximum amount recoverable under the breach claim. In closing argument, counsel for Wright admitted that the evidence was unclear with respect to the amount actually due Wright in his breach claim.

Nonetheless, the court finds no basis to overturn the jury's resolution of the compensatory damages issue. The jury awarded a figure within the disputed range with respect to the breach claim standing alone. More importantly, the compensatory damages award included damages resulting from both the contract claim and the fraud claim. Thus, some of the award is fairly allocable to Wright's claim of mental anxiety, which is, as noted in a previous section of this order, recoverable under Alabama law. The court need not explain precisely how the jury arrived at its figure; it must only determine whether that figure falls within the permissible range under the law. *See Fossett v. Davis*, 531 So. 2d 849, 853 (Ala. 1988). The award in this case is clearly within that range.

2. Punitive damages. In the leading case on the subject, the Alabama Supreme Court recognized two flaws justifying the granting of a motion for a new trial on the grounds of excessiveness of a verdict.

> First, [the award] may include or exclude a sum which is clearly recoverable or not as a matter of

> law, or which is totally unsupported by the evidence, where there is an exact standard or rule of law that makes the damages legally and mathematically ascertainable at a precise figure. In these situations, a trial court may, and should, reduce or increase the amount of the verdict to reflect the amount to which the parties are entitled as a matter of law. Second, a jury verdict may be flawed because it results, not from the evidence and applicable law, but from bias, passion, prejudice, corruption, or other improper motive.

Hammond v. City of Gadsden, 493 So. 2d 1374, 1378 (Ala. 1986). This case does not involve any flaws of the first type. With respect to the second type, the court must take care not to overturn the verdict "merely because it believes that the verdict overcompensates the plaintiff. . . . The trial court may not substitute its personal judgment for that of the jury." *Western Supermarkets, Inc. v. Keith*, 528 So.2d 317, 321 (Ala. 1988).

To aid trial courts in making this determination, the *Hammond* court set out a number of factors to be considered in any particular case. These factors are: (1) the culpability of defendant's conduct; (2) the desirability of discouraging other from similar conduct; and (3) the impact upon the parties. *Hammond*, 493 So. 2d at 1379. The court was quick to point out, however, that this list was not exclusive, and that each case must be analyzed on its facts. *Id.* Another relevant means of scrutinizing the verdict, for instance, is by comparing it to awards in similar cases. *See Aetna Life Insurance Co. v. Lavoie*, 505 So. 2d 1050, 1053 (Ala. 1987); *Estate of Jackson v. Phillips Petroleum Co.*, 676 F. Supp. 1142, 1155-57 (S.D. Ala. 1987).

Finally, it remains true after *Hammond* that remittitur is in order when the amount of the verdict "is so great as to plainly indicate that it was the result of passion, bias, prejudice, or improper motive." *Fruehauf Corp. v. Welch*, 519 So. 2d 502, 506 (Ala. 1988); *accord Burch v. Burgess*, 521 So. 2d 921, 923 (Ala. 1988). In a like vein, punitive damage awards large enough to "shock the judicial conscience" justify the court's issuance of a remittitur. *See Mercer v. Davis & Berryman International., Inc.*, 834 F.2d 922, 929 (11th Cir. 1987) (*citing Village Toyota Co. v. Stewart*, 433 So. 2d 1150, 1155 (Ala. 1983)).[8]

Conducting the prescribed analysis in this case, the court finds that the punitive damages award is excessive. The court determines that the jury's verdict must be based on bias, passion or prejudice, and that the amount of the punitive damages award is so high that on its face the verdict is excessive. The court has reviewed other recently published Alabama cases involving punitive damage awards in fraud cases, and finds that the verdict before it far exceeds the normal award; indeed, it exceeds all such awards challenged as excessive in Alabama fraud cases reported in the last two years.[9] This award shocks the conscience of the court, and remittitur under the facts of this case is proper.

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[8] While Preferred Research does not specifically request remittitur as an alternative to new trial in its motion, the parties have treated the procedure as an issue in their briefs, and the court understands remittitur to be properly before it.

[9] The court bases this assertion on a Westlaw computer search in the Alabama database of fraud cases reported in 1987 and 1988.

Since the court has found the award of punitive damages to be excessive under Alabama law, the appropriate federal remedy is "a remittitur order reducing a jury's award to the outer limit of the proof." *Goldstein v. Manhattan Industries, Inc.*, 758 F.2d 1435, 1448 (11th Cir.), *cert. denied*, 474 U.S. 1005, 106 S.Ct. 525 (1985). The course for the court is to "keep[ ] the verdict within reasonable bounds considering the purpose to be achieved as well as the corporate defendant's wanton or reckless indifference to the plaintiff's rights." *Gilbert v. St. Louis-San Francisco Railroad Co.*, 514 F.2d 1277, 1281 (5th Cir. 1975) (quoting *Curtis Publishing Co. v. Butts*, 351 F.2d 702, 719 (5th Cir. 1965), *aff'd on other grounds*, 388 U.S. 130, 87 S.Ct. 1975 (1967)). Based upon its assessment of the defendant's culpability, the deterrent purpose of punitive damages in Alabama fraud actions, and analogous cases, the court determines that the law will tolerate a punitive damages award in this case of no more than $150,000.00.

Accordingly, it is ORDERED that defendant Preferred Research, Inc.'s July 21, 1988, motion for judgment notwithstanding the verdict be and it is hereby denied. It is further ORDERED that defendant's July 21, 1988, motion for new trial be and it is hereby denied on the condition that plaintiff Sidney H. Wright, III, file with the court no later than December 28, 1988, a remittitur in the amount of $1,350,000, affording the plaintiff a judgment of $157,000; otherwise, the court will order a new trial as to punitive damages on the plaintiff's fraud claim.

DONE, this the 13th day of December, 1988.

/s/ Myron H. Thompson
UNITED STATES DISTRICT JUDGE

EOD 12/13/88

APPENDIX D

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA,
SOUTHERN DIVISION

SIDNEY H. WRIGHT, III, Plaintiff,	)	
v.	)	CIVIL ACTION NO. 87-T-1046-S
PREFERRED RESEARCH, INC., a Georgia corporation, Defendant.	)	(Filed December 1, 1989)

JUDGMENT

It is therefore the ORDER, JUDGMENT, and DECREE of the court:

(1) That judgment be and it is hereby entered in favor of plaintiff Sidney H. Wright, III, and against defendant Preferred Research, Inc.;

(2) That plaintiff Wright have and recover from defendant Preferred Research, Inc. the sum of $7000.00 in compensatory damages;

(3) That plaintiff Wright have and recover from defendant Preferred Research, Inc. the additional sum of $150,000.00 in punitive damages; and

(4) That costs be and they are hereby taxed against defendant Preferred Research, Inc., for which execution may issue.

DONE, this the 1st day of December, 1989.

/s/ Myron H. Thompson
UNITED STATES
DISTRICT JUDGE

12-1-89

APPENDIX E

Sidney H. WRIGHT, III,
Plaintiff-Appellee,
v.
PREFERRED RESEARCH, INC., a Georgia Corp.,
Defendant-Appellant.
No. 89-7014.
United States Court of Appeals,
Eleventh Circuit.

Jan. 11, 1990.

The United States District Court for the Middle District of Alabama, No. 87-T-1046-S, Myron H. Thompson, J., entered judgment awarding $1,500,000 in punitive damages and $7,000 in compensatory damages. Defendant's subsequent motion for new trial was denied on condition that plaintiff file consent to remittitur. Plaintiff filed both consent and motion to reconsider. Defendant then filed notice of appeal, two days prior to District Court's denial of plaintiff's motion to reconsider. The Court of Appeals dismissed the appeal as premature since filed before disposition of plaintiff's motion for reconsideration. Petition for rehearing and suggestion for rehearing en banc was filed. The Court of Appeals held that motion to reconsider remittitur order tolled beginning of time limit for filing notice of appeal.

Petition and suggestion denied.

George L. Beck, Jr. and W. Terry Travis, Montgomery, Ala. for defendant-counterclaim-plaintiff-appellant.

James A. Ward, III, Dothan, Ala., for plaintiff-counterclaim-defendant-appellee.

Appeal from the United States District Court for the Middle District of Alabama.

Before VANCE*, HATCHETT and CLARK, Circuit Judges.

ON PETITION FOR REHEARING AND SUGGESTION OF REHEARING IN BANC

PER CURIAM:

In this petition for rehearing we are asked to reconsider whether defendant-appellant Preferred Research, Inc. filed its notice of appeal prematurely. Earlier we dismissed this appeal because Preferred's notice was filed while plaintiff-appellee Sidney Wright still had a motion for reconsideration pending before the district court. Preferred now argues that Wright's motion for reconsideration was untimely, and that in any event it was not the type of motion that bars a notice of appeal. Finding no merit in these contentions, we deny Preferred's petition for rehearing.

I.

In the district court plaintiff-appellee Sidney H. Wright, III (hereinafter "Wright") was awarded $1,500,000 in punitive damages and $7,000 in compensatory damages. The judgment and order in Wright's favor was entered on July 14, 1988. A week later defendant-appellant Preferred Research, Inc. (hereinafter "Preferred")

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* This opinion was concurred in by Honorable Robert S. Vance prior to his death on December 16, 1989.

filed motions for judgment notwithstanding the verdict ("j.n.o.v."), for a new trial, and for a stay of proceedings. On July 26, 1988, the trial court granted Preferred's motion to stay the proceedings until the disposition of Preferred's other motions. On December 13, 1988, the trial court denied the motion for j.n.o.v. and ordered that the motion for a new trial be denied on the condition that Wright file a consent to remittitur not later than December 28, 1988. Wright filed both a consent to the remittitur and a motion to reconsider the remittitur order on December 28, 1988. On January 4, 1989, Preferred filed its notice of appeal. On January 6, 1989, the trial judge denied Wright's motion to reconsider the order of remittitur, but allowed Wright additional time to brief his request for equitable relief contained in the motion to reconsider the order of remittitur. On January 31, 1989, the trial court denied Wright's motion for reconsideration "in all remaining respects."

On July 27, 1989, this panel entered an order dismissing Preferred's appeal on the ground that, because Preferred filed its notice of appeal prior to the disposition of Wright's motion for reconsideration, the notice was premature. Preferred has filed a petition for rehearing to which we now respond.

II.

Fed.R.App.P. 4(a)(1) provides that notice of appeal in a civil case must be filed within 30 days from the entry of judgment. This time limit is mandatory and jurisdictional. *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 61, 103 S.Ct. 400, 403, 74 L.Ed.2d 225 (1982). When a party

files one of the motions for post-judgment relief enumerated in Fed.R.App.P. 4(a)(4), however, the commencement of the appeal period is tolled until the resolution of the motion. *Livernois v. Medical Disposables, Inc.*, 837 F.2d 1018, 1020 (11th Cir.1988).

In the present case, judgment was entered on July 14, 1988. The finality of the judgment was suspended, however, and the appeal period was tolled, when Preferred filed motions for j.n.o.v. and for a new trial. Fed.R.App.P. 4(a)(4); *Phinney v. Houston Oil Field Material Co.*, 252 F.2d 357, 359 (5th Cir.1958).

The district court denied all of Preferred's motions but denied the motion for new trial conditionally upon Wright's acceptance of a remittitur. When Wright accepted the remittitur on December 28, 1988, the judgment became final and appealable, actuating the 30-day period within which a notice of appeal must be filed. *Howell v. Marmpegaso Compania Naviera, S.A.*, 566 F.2d 992, 993 (5th Cir.1978). The precise question before us now is whether Wright tolled the beginning of the time limit once again by filing a motion for reconsideration. If so, Preferred's notice of appeal was premature; if not, the notice was effective.

In order to decide this question, it is necessary to decide two subsidiary questions: whether the motion for reconsideration was a "motion to amend the judgment" for the purposes of Fed.R.Civ.P. 59(e), and if it was, whether it was timely filed within the requirements of that rule.

A. *Whether the Motion for Reconsideration Was A Motion Pursuant To Rule 59(e)*

Whether a motion for post-judgment relief can be categorized as a motion under Rule 59 is not determined by whether the movant so labels it. Rather, the court must determine independently what type of motion was before the district court, depending upon the type of relief requested. *Livernois*, 837 F.2d at 1020.

Rule 59 applies to motions for reconsideration of matters encompassed in a decision on the merits of a dispute. *Finch v. City of Vernon*, 845 F.2d 256, 258 (11th Cir.1988); *Livernois*, 837 F.2d at 1021. A notice of appeal filed before entry of judgment denying a motion for reconsideration is ineffectual. *Griggs*, 459 U.S. at 61, 103 S.Ct. at 403; *Briggs v. Procunier*, 764 F.2d 368, 370 (5th Cir.1985).

This general rule applies, however, only where the motion for reconsideration represents the movant's *first attack* on the trial court's judgment. *Trowel Trades Emp. Health v. Edward L. Nezelek, Inc.*, 645 F.2d 322, 325 (5th Cir. Unit B May 1981).

> Both the language and purpose of Rule 4(a)(4) indicate that the time for appeal is postponed only by an *original* motion of the type specified. *I.e.*, a motion to reconsider an order disposing of such a motion will not further postpone the time to appeal. However, if the disposition of the first motion results in a judgment which is substantively altered, a subsequent timely motion will again postpone the appeal period.

9 Moore's Federal Practice ¶204.12[1] (emphasis in original).

Similarly, where the movant pleads substantially the same grounds in a second motion to reconsider as he did in his original pleading, *Ellis v. Richardson*, 471 F.2d 720, 721 (5th Cir.1973), or seeks reconsideration of an amended order that does not enlarge upon a previously reconsidered order, *Dixie Sand & Gravel Co. v. Tenn. Valley Auth.*, 631 F.2d 73, 75 (5th Cir. 1980), then the time limit is not tolled. None of these exceptions to the general rule applies to Wright's motion for reconsideration, which represented the first attack on what was, in substance, a new and greatly reduced judgment.

The situation in the present case is similar to that in *Harrell v. Dixon Bay Transportation Co.*, 718 F.2d 123 (5th Cir.1983). In that case, the trial court granted in part and denied in part defendant Dixon Bay's motion for j.n.o.v., and Harrell filed a motion for reconsideration. On appeal, the court had to determine whether Harrell's motion postponed the commencement of the time period for filing his notice of appeal. The court decided that it did. 718 F.2d at 127.

The *Harrell* court recognized that earlier Fifth Circuit cases, *Wansor v. George Hantscho Co. Inc.*, 570 F.2d 1202 (5th Cir.1978) and *Dockery v. Travelers Co. of Hartford, Connecticut*, 349 F.2d 1017 (5th Cir.1965), had identified certain instances in which motions for reconsideration did not further postpone the time for filing a notice of appeal beyond the time afforded by the decision on the original motion. *Harrell*, 718 F.2d at 127. The *Harrell* court

pointed out, however, that these earlier cases had involved a set of facts different than those in *Harrell*:

> Dixon Bay's reliance on *Wansor* and *Dockery* is . . . misplaced, since each case concerns a motion filed by a party asking the trial court to reconsider the *denial* of that same party's prior *post-judgment* motion to alter or amend the original judgment.

Id. (citation omitted) (emphasis in original). In contrast, the partial grant of Dixon Bay's motion for j.n.o.v. represented the *first* time that Harrell had been confronted with an unfavorable judgment from the district court. The appellant court therefore construed his motion for reconsideration, timely filed within ten days after entry of the court's order, as "a motion to alter or amend the judgment" pursuant to Rule 59. *Id.*

The same reasoning applies to the case now before us. As in *Harrell*, the trial court's remittitur order left Wright facing a greatly reduced award, so different from the original judgment as to constitute a new judgment. Unlike the situation in *Ellis*, Wright's motion does not parrot the arguments from a prior motion but raises for the first time the grounds upon which the trial court should reconsider its order. We hold that Wright's motion for reconsideration qualified as an original motion "to alter or amend the judgment" pursuant to Rule 59.

B. *Whether the Motion Was Timely*

In order for Wright's motion to have postponed the time for the filing an appeal, it must have been filed within ten days of the "entry of judgment." Fed.R.Civ.P.

59(e). The ten day period is jurisdictional and cannot be extended by the court. Fed.R.Civ.P. 6(b).

> In a civil case . . . the timeliness of a motion for rehearing or reconsideration is governed by Rule 52(b) or Rule 59, each of which allows only 10 days; and Rule 4(a) follows the "traditional and virtually unquestioned practice" in requiring that a motion be timely if it is to toll the time for appeal.

Browder v. Director, Dept. of Corrections of Ill., 434 U.S. 257, 268-69, 98 S.Ct. 556, 563, 54 L.Ed.2d 521 (1978) (footnote omitted).

We need not decide whether the "entry of judgment" occurred when the district court issued its conditional order denying a new trial, or when Wright subsequently filed its acceptance of the remittitur, since Wright's motion was timely in either case. The district court entered its order on December 13. Wright filed his motion for reconsideration on December 28. Although Wright did not file until fifteen *calendar* days after the order, he had ten *business* days in which to file.

> When the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation. As used in this rule[,] "legal holiday" includes . . . Christmas Day. . . .

Fed.R.Civ.P. 6(a). Since Rule 6(a) excludes five of the fifteen intervening days,[1] Wright legally filed his motion

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[1] Saturday-December 17, Sunday-December 18, Saturday-December 24, Sunday-December 25, and Monday-December 26 (the legal Christmas holiday).

for reconsideration ten days after he had been ordered to elect between remittitur and a new trial. Consequently, Wright's motion was timely.

III.

Because Wright's motion for reconsideration was a timely motion to amend the judgment under Rule 59, Preferred's subsequent notice of appeal was premature, and its appeal was properly dismissed. Accordingly, the petition for rehearing is DENIED. No member of this panel nor other judge in active service on this court having requested that the court be polled on rehearing in banc, the suggestion for rehearing in banc is DENIED.

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 89-7930

SIDNEY H. WRIGHT, III,

Plaintiff-Appellee,

versus

PREFERRED RESEARCH, INC.,
a Georgia Corporation,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Alabama

(Filed Oct. 10, 1991)

Before JOHNSON and COX, Circuit Judges, AND MORGAN, Senior Circuit Judge.

PER CURIAM:

The Petition(s) for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Emmett R. Cox
United States Circuit Judge

OPPOSITION BRIEF UNAVAILABLE FOR FILMING
AT THIS TIME